A

DATO' SERI ANWAR IBRAHIM

v.

PP

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
RAUS SHARIF FCJ
ABDULL HAMID EMBONG FCJ
[CRIMINAL APPEALS NOS: 05-144-2009(W),
C 05-145-2009(W) & 05-146-09(W)]
29 JANUARY 2010

CRIMINAL PROCEDURE: *Appeal - Appellate court, power and duty of - Exercise of discretion by first instance judge - Circumstances when*
D *such discretion subject to interference by appellate court*

CRIMINAL PROCEDURE: *Appeal - Right of - Order of High Court on a s. 51 Criminal Procedure Code application - Whether such order finally disposing of rights of parties - Whether such order appealable - Criminal Procedure Code, s. 51 - Courts of Judicature Act 1964, ss. 3,*
E *50(1)*

CRIMINAL PROCEDURE: *Disclosure of information - Discovery of documents and other things - Application for discovery made at pre-trial stage - Whether applicant only entitled to documents and materials*
F *pertaining to the charge - 'in the course of trial', meaning of*

CRIMINAL PROCEDURE: *Disclosure of information - Discovery of documents and other things - Section 51 of Criminal Procedure Code - Scope and extent of - Whether s. 51 of Criminal Procedure Code separate*
G *and distinct from s. 51A - Whether judge had erred in importing philosophy behind s. 51A when interpreting s. 51 of Criminal Procedure Code - Criminal Procedure Code, ss. 51, 51A*

CRIMINAL PROCEDURE: *Disclosure of information - Discovery of*
H *documents and other things - Application under s. 51 of Criminal Procedure Code - 'Necessary or desirable', whether dependent on when application is made - Whether roving or fishing inquiries for evidence permissible - Whether accused entitled to know at pre-trial stage how prosecution would advance its case - Criminal Procedure Code, s. 51*

I ***STATUTORY INTERPRETATION:*** *Construction of statutes - Literal approach - Whether statute to be given a literal, grammatical interpretation where the meaning is plain and clear - Whether object or purpose of statute ought to be promoted when interpreting its provisions - Interpretation Acts 1948 and 1967*

WORDS & PHRASES: *'Necessary or desirable' - Whether dependent on when application is made - Criminal Procedure Code, s. 51*

The appellant had applied under s. 51 and/or s. 51A of the CPC, for an order to compel the respondent to produce certain documents, materials and items. These documents and/or items were said to be important for the preparation of the appellant's defence to a charge under s. 377B of the Penal Code. In the High Court, the judge allowed most parts of the appellant's application. The Public Prosecutor ('PP') appealed to the Court of Appeal and the appellant cross-appealed. The Court of Appeal set aside all the orders made by the High Court in compelling the production of most of the documents and materials requested by the appellant. It allowed the PP's appeal substantially and dismissed the appellant's cross-appeal and preliminary objection concerning the court's jurisdiction to hear the appeal. The appellant thus appealed to the Federal Court. At the outset of the hearing, the appellant's counsel again raised the same preliminary objection, arguing that the court was not competent to hear the appeal. In gist, counsel submitted that the High Court's decision did not finally dispose of the rights of the parties and hence was not appealable.

Held (dismissing the preliminary objection and the appeal)
Per Abdull Hamid Embong FCJ (delivering the judgment of the court):

(1) The order made by the High Court judge was a final order that had finally disposed of the rights of the appellant. The matter was therefore appealable. (paras 24 & 25)

(2) *Prima facie*, a piece of legislation is to be given a literal or grammatical meaning where the meaning is plain and clear, without considering other interpretative criteria. Parliament must be taken to mean what it says. The court in interpreting statutes must not be seen to be splitting hairs or producing any inconsistency or absurdity. Further, the object or purpose of a statute should be promoted in interpreting any of its provisions, as prescribed by s. 17A of the Interpretation Acts 1948 and 1967. (paras 34 & 35)

(3) By importing the philosophy behind s. 51A CPC into s. 51 and interpreting it (s. 51) in a liberal fashion, the High Court judge had erred. The object of s. 51 is limited and its scope restricted. By his approach, the judge had expanded s. 51 of the CPC and changed the law - something which was not the judiciary's task but Parliament's. *Duport Steels Ltd v. Sirs HL* (refd); *Navaradnam v. Suppiah Chettiar* (refd). (para 36)

(4) Sections 51 and 51A are two separate and distinct provisions. Section 51A imposes an obligation upon the prosecution to supply the accused with certain documents and materials. It has no connection to s. 51 which gives the court discretion to allow for discovery in specific instances. Section 51 could not be modified with the aid of the supposed philosophy underlying the new s. 51A, even if such philosophy existed. It was thus wrong for the judge to conclude that s. 51A, had changed the mode of prosecution in a criminal trial, and in the process ignore past precedents on its interpretation. It was also wrong for the judge to say that earlier cases decided on s. 51 were no longer applicable. (para 37)

(5) In the instant case, the application for discovery by the Appellant was made at a pre-trial stage and not made 'in the course of the trial'. At the pre-trial stage the appellant would only be entitled to those documents and materials pertaining to the charge, to enable him to understand the charge and prepare his defence. The phrase 'in the course of trial' means that the trial proper has commenced in that evidence has been led by the calling of witnesses. The phrase does not mean the stage where the charge is only read to the accused. *PP v. Raymond Chia Kim Chwee & Anor* (foll). (paras 40, 41, 42, 43 & 44)

(6) Although s. 51 appears couched in rather wide terms, it should not literally be taken to be capable of allowing for a wide ranging application, as in the instant case. Its scope is confined to the production of documents or materials 'necessary or desirable' for the purposes of the trial. These two qualifications depend on which particular stage or point of time the application is made. If, as in this case, it is made at the pre-trial stage, then the discovery must be confined to the matters specified in the charge. In the instant case, the charge was specific and was sufficiently particularized to accord the appellant a fair trial. The requirement of justice had been met, even without the documents and materials sought. *PP v. Raymond Chia Kim Chwee & Anor* (foll). (para 45)

(7) Although the appellant contended that the documents and materials were essential to the preparation of his defence, at the pre-trial stage the defence was not yet a relevant consideration for the court hearing the application. The appellant's application ought not to be turned into a mini trial to determine his defence on the charge. Further, a roving and fishing inquiry for

evidence was not permissible at the pre-trial stage under s. 51 CPC. The appellant was not entitled to know by what means the prosecution intended to prove the facts underlying the charge he faced. This was the prosecution's prerogative. In the instant case, the appellant had not met the dual requirements of necessity and desirability as laid down under s. 51 of the CPC. *PP v. Raymond Chia Kim Chwee & Anor* (foll). (paras 46 & 47)

(8) There were qualifications to the settled principle that an appellate court would not disturb any decision made in the proper exercise of a judge's discretion. Thus, any exercise of discretion based on an error of law, a wrong principle, irrelevant consideration or which resulted in a miscarriage of justice may be reversed by an appellate court. In the instant case, the High Court judge had improperly exercised his discretion, thereby leading to the Court of Appeal's interference. *Vasudevan Vazhapulli Raman v. Damodaran & Anor* (refd); *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram*. (para 49)

(9) The right to a fair trial is an inviolable, universal principle. Section 51A of the CPC strengthens the guarantee of a fair trial. It ensures the fairness of a trial and ultimately upholds the very integrity of the courts in its administration of criminal justice. *PP v. Mohd Fazil Awaluddin* (foll). (paras 51 & 52)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memohon di bawah s. 51 dan/atau s. 51A Kanun Tatacara Jenayah untuk perintah memaksa responden mengemukakan dokumen-dokumen, bahan-bahan dan item-item tertentu. Dokumen-dokumen dan/atau item-item ini adalah penting bagi penyediaan pembelaan perayu terhadap pertuduhan di bawah s. 377B Kanun Keseksaan. Dalam Mahkamah Tinggi, Hakim membenarkan sebahagian besar dari permohonan perayu. Pihak pendakwaraya (PP) membuat rayuan ke Mahkamah Rayuan dan perayu membuat rayuan balas. Mahkamah Rayuan mengenepikan perintah-perintah yang dibuat oleh Mahkamah Tinggi dalam memaksa pengemukaan kebanyakan dokumen-dokumen dan bahan-bahan yang diminta oleh perayu.Ia membenarkan rayuan pihak pendakwaraya secara substantial dan menolak rayuan balas perayu dan bantahan awalan mengenai bidang kuasa mahkamah untuk membicara rayuan. Perayu oleh itu membuat rayuan ke Mahkamah Persekutuan. Di permulaan pendengaran perbicaraan, peguam perayu sekali lagi membangkitkan bantahan awalan yang sama, dengan berhujah bahawa mahkamah

A tidak berkompeten untuk mendengar rayuan. Dalam inti patinya, peguam berhujah bahawa keputusan Mahkamah Tinggi tidak memutuskan hak pihak-pihak secara mutlak dan oleh itu tidak boleh dirayui.

B **Diputuskan (menolak bantahan awalan dan rayuan)**
Oleh Abdull Hamid Embong HMR (menyampaikan penghakiman mahkamah):

(1) Perintah yang dibuat oleh Hakim Mahkamah Tinggi adalah perintah muktamad yang telah memutuskan hak-hak perayu. C Oleh itu, halperkara boleh dirayui.

(2) *Prima facie*, sesuatu penggubalan undang-undang mesti diberi makna literal atau gramatis di mana maksudnya adalah jelas dan terang, tanpa mengambil pertimbangan kriteria pentafsiran yang D lain. Parlimen mesti dianggap bermaksud apa yang dikatakan. Mahkamah dalam mentafsirkan statut tidak harus diperlihatkan seperti 'splitting hairs' atau mengemukakan apa-apa yang tidak konsisten atau kedangkalan. Seterusnya, objek dan tujuan statut sepatutnya digunakan untuk mentafsirkan peruntukan- E peruntukan, seperti yang diberikan oleh Akta Tafsiran 1948 dan 1967.

(3) Dengan menggunakan falsafah di sebalik s. 51A Kanun Tatacara Jenayah dalam s. 51 dan mentafsirkannya (s. 51) dengan cara yang liberal, Hakim Mahkamah Tinggi khilaf. F Objek s. 51 adalah terbatas dan skopnya terhad. Dengan pendekatannya, Hakim telah mengembangkan s. 51 Kanun Tatacara Jenayah dan mengubah undang-undang - sesuatu yang bukan tugas badan kehakiman tetapi tugas Parlimen. *Duport Steels Ltd v. Sirs HL* (refd); *Navaradnam v. Suppiah Chettiar* G (refd).

(4) Seksyen-seksyen 51 dan 51A adalah peruntukan yang lain dan berbeza. Seksyen 51A mengenakan obligasi terhadap pendakwaan untuk memberi tertuduh dokumen-dokumen dan bahan-bahan H tertentu. Ia tidak ada apa-apa kaitan dengan s. 51 yang memberi mahkamah budi bicara untuk membenarkan penzahiran dalam keadaan-keadaan spesifik. Seksyen 51 tidak boleh diubahsuai dengan bantuan falsafah yang menjadi dasar s. 51A yang baru, walaupun falsafah tersebut wujud. Ia adalah salah I untuk hakim membuat kesimpulan bahawa s. 51A, telah mengubah cara pendakwaan di dalam perbicaraan jenayah, dan di dalam proses tidak menghiraukan tafsiran-tafsiran duluan. Hakim juga khilaf apabila menyatakan bahawa kes-kes terdahulu mengenai s. 51 tidak boleh digunapakai sekarang.

(5) Di dalam kes ini, permohonan untuk penzahiran oleh perayu dibuat pada peringkat pra-perbicaraan dan bukan 'in the course of the trial.' Pada peringkat pra-perbicaraan perayu hanya berhak ke atas dokumen-dokumen dan bahan-bahan berhubungan dengan pertuduhan, untuk membolehkan perayu memahami pertuduhan dan membuat persediaan untuk pembelaannya. Frasa 'in the course of the trial' bermakna perbicaraan sebenar telah bermula di mana keterangan telah dikemukakan dengan pemanggilan saksi-saksi. Frasa tersebut tidak bermaksud peringkat di mana pertuduhan dibacakan kepada tertuduh. *PP v. Raymond Chia Kim Chwee & Anor* (foll).

(6) Walaupun s. 51 diperbahasakan dalam terma-terma yang luas, ia tidak patut diambil secara literal bahawa ia boleh membenarkan berbagai-bagai pemakaian, seperti di dalam kes ini. Skopnya adalah dihadkan ke pengemukaan dokumen-dokumen atau bahan-bahan 'necessary or desirable' bagi tujuan perbicaraan. Kedua-dua syarat-syarat ini bergantung kepada peringkat mana atau masa permohonan dibuat. Jikalau, seperti di dalam kes ini, ia dibuat pada peringkat pra-perbicaraan, penzahiran mesti dihadkan kepada halperkara-halperkara yang dispesifikasikan di dalam pertuduhan. Di dalam kes ini, pertuduhan adalah spesifik dan diperincikan dengan secukupnya untuk memberikan perayu perbicaraan yang adil. Keperluan keadilan telah ditepati, walaupun tanpa dokumen-dokumen dan bahan-bahan yang dituntut. *PP v. Raymond Chia Kim Chwee & Anor* (foll).

(7) Walaupun perayu berhujah bahawa dokumen-dokumen dan bahan-bahan adalah penting bagi penyediaan pembelaannya, di peringkat pra-perbicaraan pembelaan bukan merupakan pertimbangan yang relevan untuk mahkamah yang mendengar permohonan itu. Permohonan perayu tidak boleh dijadikan perbicaraan kecil untuk memutuskan pembelaannya terhadap pertuduhan. Seterusnya, siasatan yang mengeliling dan memancing untuk keterangan tidak dibenarkan di peringkat pra-perbicaraan di bawah s. 51 Kanun Tatacara Jenayah. Perayu tidak berhak untuk mengetahui apakah cara-cara yang digunakan pihak pendakwaan untuk membuktikan fakta-fakta dasar pertuduhan yang perayu hadapi. Ini adalah prerogatif pihak pendakwaan. Di dalam kes ini, perayu tidak memenuhi permintaan-permintaan keperluan dan kehendak yang telah diberi oleh s. 51 Kanun Tatacara Jenayah. *PP v. Raymond Chia Kim Chwee & Anor* (foll)

(8) Wujudnya syarat-syarat ke atas prinsip mantap bahawa mahkamah rayuan tidak akan mengganggu keputusan yang dibuat di dalam pelaksanaan budibicara yang wajar oleh hakim. Oleh itu, apa-apa pelaksanaan budibicara berdasarkan kesalahan undang-undang, prinsip yang salah, pertimbangan yang tidak relevan atau yang mengakibatkan ketidakadilan boleh diterbalikkan oleh mahkamah rayuan. Di dalam kes ini, Mahkamah Tinggi telah melaksanakan budibicaranya dengan cara yang tidak berpatutan, yang telah membawa ke campurtangan mahkamah rayuan. *Vasudevan Vazhapulli Raman v. T Damodaran PV Raman & Anor* (refd); *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram*

(9) Hak untuk perbicaraan yang adil adalah prinsip yang universal dan tidak boleh dicabuli. Seksyen 51A Kanun Tatacara Jenayah menguatkan jaminan untuk perbicaraan yang adil. Ia memastikan keadilan sesuatu perbicaraan dan mempertahankan integriti mahkamah-mahkamah dalam pentadbiran keadilan jenayah. *PP v. Mohd Fazil Awaluddin* (foll).

Case(s) referred to:

Ang Gin Lee v. PP [1991] 2 CLJ 857; [1991] 1 CLJ (Rep) 13 SC ***(refd)***
Dato Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Duport Steels Ltd v. Sirs, HL [1980] 1 All ER 541 ***(refd)***
Muzammil Izat Hashim v. PP [2009] 2 CLJ 354 CA ***(refd)***
Navaradnam v. Suppiah Chettiar [1973] 1 LNS 98 FC ***(refd)***
PP v. Hoo Chang Chwen [1962] 1 LNS 123 HC ***(refd)***
PP v. Mohd Fazil Awaluddin [2009] 2 CLJ 862 HC ***(foll)***
PP v. Raymond Chia Kim Chwee & Another Case [1983] 1 CLJ 321; [1983] CLJ (Rep) 798 HC ***(foll)***
PP v. Raymond Chia Kim Chwee & Anor & Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(foll)***
PP v. RK Menon & Anor [1977] 1 LNS 101 HC ***(refd)***
Retnasara Annarasa v. PP [2008] 4 CLJ 90 HC ***(refd)***
Rex v. Bryant And Dickson [1946] 3 Cr App R 146 ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA ***(refd)***
SJN Thomas Manivello v. LT Kol Din Yati Dahlan & Ors [1998] 3 CLJ 761 CA ***(refd)***
State Of Orissa v. Debendra Nath Padhi [2004] 4 LRI 860 ***(refd)***
Vasudevan Vazhapulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 50(1)
Criminal Procedure Code, ss. 418A, 51, 51A(1)(b), (c), 107, 112, 152, 153, 154
Interpretation Acts 1948 and 1967, s. 17A
Penal Code, ss. 377B, 467, 471

Code of Criminal Procedure 1973 [Ind], s. 91

For the appellant - Karpal Singh (SN Nair, Wan Anuar Shaddat & Dato Param Cumaraswamy with him); M/s Karpal Singh & Co
For the respondent - Dato Mohd Yusof Hj Zainal Abiden, Solicitor General II (Dato Nordin Hassan, Wan Mohamad Hanafiah Zakaria, Wong Chiang Kiat, Noorin Badaruddin & Farah Azlina Latif DPP's with him); AG's Chambers

[Appeal from Court of Appeal; Criminal Appeal Nos: W-09-71-09 & W-09-74-09]

Reported by Andrew Christopher Simon

JUDGMENT

Abdull Hamid Embong FCJ:

Background

[1] The appellant was originally charged in the Sessions Court on 7 August 2008 under s. 377B of the Penal Code, to which he pleaded not guilty. He is alleged to have committed the offence against one Mohd Saiful Bukhari bin Azlan (the complainant) on 26 June 2008 at Unit 11-5-1, Desa Damansara Condominium Bukit Damansara, Kuala Lumpur between 3.01 and 4pm.

[2] On 5 March 2009, his case was transferred to the High Court on a certificate under s. 418A of the Criminal Procedure Code (CPC) signed by the public prosecutor.

[3] Earlier, in the Sessions Court, the appellant had, through his counsel, made a number of requests to the respondent to have access to various documents and materials. Those requests were denied.

[4] Dissatisfied with the response, the appellant filed an application by way of an originating motion dated 10 June 2009 under s. 51 and/or s. 51A CPC, for an order to compel the respondent and/or other persons having custody, care and control, to produce to the appellant the following documents, materials and items:

A (i) the original CCTV recordings allegedly taken from the guardhouse and lifts in Block 11 of Desa Damansara Condominium and any other locations fitted with CCTVs within the Condominium;

B (ii) DNA samples - the original samples, original swabs taken off the complainant, slides made during testing, pictures of the slides and the "Electro Pherogram" for each sample;

(iii) the notes of the chemists who did the testing and analysis on the DNA samples;

C

(iv) the notes from all the doctors who examined the complainant at Hospital Kuala Lumpur;

(v) the doctors' notes, photographs and report of the proctoscopy or other tests done on the complainant at Hospital Kuala

D Lumpur;

(vi) the report from Hospital Pusrawi and doctor's notes on the examination done on the complainant;

E (vii) the video recording of statement by the complainant on 30 June 2008;

(viii) witness statements under s. 112 CPC of:

F (a) the complainant,

(b) Haji Hassanudin Abdul Hamid,

(c) Nursham,

G (d) Muhamad Rahimi bin Osman,

(e) Mohd Rasid Mohd Rosdi,

(f) Dr. Osman Abdul Hamid, and

H (g) any other witnesses not listed above.

(ix) copies of all documents and items which will be produced by the respondent under s. 51A(1)(b) CPC;

(x) a statement of facts favouring the appellant under

I s. 51A(1)(c) CPC;

(xi) all documents and items that will not be used by the respondent in the trial;

(xii) a list of the prosecution witnesses; and

(xiii) alternatively, the appellant prayed for an order that the respondent to disclose to him and/or that the appellant be allowed to inspect, all the documents and items mentioned above.

[5] Since the application was filed, the respondent had provided the appellant with the following documents and materials:

(i) a CD with a copy of the alleged CCTV recording for 26 June 2008;

(ii) copies of the "Electro Pherogram" of the alleged DNA samples tested;

(iii) notes from the doctor (as opposed to a report) from Pusrawi Hospital; and

(iv) a clearer copy of the appellant's statement.

Order Of The High Court

[6] The High Court allowed most parts of the appellant's application for the production of documents and materials applied for, except for the production of CCTV recordings at other locations within the Desa Damansara Condominium, the original DNA samples and the statements under s. 112 of the CPC of other witnesses not named by the appellant. The High Court also allowed copies of all documents to be produced as evidence by the prosecution to be supplied to the appellant pursuant to s. 51A(1)(b) CPC. Also granted is the statement of facts favourable to the defence under s. 51A(1)(c) CPC.

[7] With regard to the production of the "Electro Pherogram" on certain identified samples, the High Court made no order on the said items since they had already been supplied to the appellant. No order was also made in respect of the video recording of the complainant's statement since the appellant was given his s. 112 statement.

[8] Being dissatisfied with the said order, the respondent filed an appeal against the whole order of the High Court *vide* Criminal Appeal No. W-09-71-2009.

[9] The appellant had also filed an appeal against part of the order *vide* Criminal Appeal No. W-09-74-2009.

A

Decision Of The Court Of Appeal

[10] The Court of Appeal overruled the findings of the trial judge and, except for the orders made under s. 51A(1)(b) and (c) CPC, set aside all the orders made by the court below in compelling the
B production of most of the documents and materials requested by the appellant in his originating motion. The reason given by the Court of Appeal is found in this concluding passage:

> For the reasons given above we are of the view that the learned Judge erred in law in not observing the judicial precedents with
C regard to the interpretation of section 51 of the Code in exercising his discretion. The High Court, like the Court of Appeal, is bound by all judgments of the apex court and it must apply the law as stated therein.

D

Preliminary Objection

[11] Learned counsel for the appellant first raised a preliminary objection saying that the matter now before us, is not appealable. This court is thus not competent to hear this appeal.

E **[12]** The reasons advanced by learned counsel on this preliminary issue is that, the decision by the trial court on this originating motion is merely a procedural ruling not affecting the rights of the parties, and that, that ruling did not finally dispose of the rights of the parties citing *Saad Abas & Anor v. PP* [1998] 4 CLJ 575 CA.
F Mr. Karpal Singh also argued that the appellant's actual "rights" for the court's determination is whether the appellant was innocent or guilty of the charge facing him. Our attention was brought to s. 50(1) of the Courts of Judicature Act 1964 (CJA) and s. 3 of the same Act which respectively state:

G

> s. 50(1). Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court.

H

> s. 3. Decision means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[13] He also read from the Explanatory Statement of the Bill to
I emphasise the rationale of s. 3. The particular passage referred to states:

> At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This causes a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.

[14] It is clear therefore that the purpose of putting in place the amended s. 3 CJA is to avoid long delays in trials due to appeals filed on interlocutory rulings made by the court in ongoing trials. This same concern had been expressed by judges before, long before the introduction of the current definition of the word 'decision' in s. 3 CJA. (see eg: *PP v. Hoo Chang Chwen* [1962] 1 LNS 123 HC and *PP v. RK Menon & Anor* [1977] 1 LNS 101 HC).

[15] It was also submitted that the decision made by the trial judge was a ruling made in the course of a trial even though the trial proper has not yet commenced. This is because the charge had been read to the appellant and his plea taken. The case of *SJN Thomas Manivello v. LT Kol Din Yati Dahlan & Ors* [1998] 3 CLJ 761 CA was cited supporting this proposition. Thus, he said, this ruling was one made under s. 3 CJA, and so not appealable.

[16] The case of *Ang Gin Lee v. PP* [1991] 2 CLJ 857; [1991] 1 CLJ (Rep) 13 was also referred to us to support the proposition that only a decision that is final in its effect may be appealed against and that this principle was in place even before the amendment to the word "decision" in s. 3 CJA, which came into effect on 1 August 1988.

[17] In his response to the preliminary objection, the learned Solicitor General II submitted that the application by the appellant was a matter independent of the trial. As such the order made by the learned judge on that application was an order not made in the course of a trial to be caught by the definition of "decision" in s. 3 CJA.

[18] In his opposing submission, he referred us to three decisions. First he cited this passage from *Dato Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 CA, stating:

> In other words, what has been excluded from the meaning of the word 'decision' is the type of judgments and orders which is termed 'interlocutory' by Halsbury's Laws of England (4th Ed) para 506 at p. 240, which reads:

> Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and give no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment and merely directs how declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.

[19] Next, the passage from the Supreme Court's decision in *PP v. Raymond Chia Kim Chwee & Anor & Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260, stating:

> With regard to the first question, under section 307(i) of the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case to which he is a party may appeal to the High Court against any such judgment, sentence or order. The word 'order' is preceded by the words 'judgment' and 'sentence'. *The order must therefore be a final order in the sense that it is final in its effect* as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. See some discussion on this point in *Mohamed Amin Bros v. Government of India* AIR [1950] FC 77 in respect of civil suits. The right of a person to ask for a document or other material in a criminal proceeding under section 51 of the Criminal Procedure Code is a right exercisable at the discretion of the Court. *Thus a decision or order to issue a summons under section 51 of the Criminal Procedure Code is a final order in the sense that it is final in its effect and therefore appealable under section 307(i) of the Criminal Procedure Code* (Emphasis added)

[20] Raymond Chia, although a pre s. 3 CJA decision, is directly on the point of whether a decision made pursuant to a s. 51 CPC application is a final decision, which is thus appealable.

[21] Finally, also cited was the Court of Appeal's case in *Muzammil Izat Hashim v. PP* [2009] 2 CLJ 354 which followed the decision in Raymond Chia.

[22] The learned Solicitor General II concluded that the order of the High Court was indeed a final order which is appealable. He added that if the respondent is deprived of an immediate appeal, the appellant, pursuant to the High Court order would be supplied or be allowed to inspect the various documents and materials he had applied for, and this would render nugatory any future appeal by the respondent which can be made only after the conclusion of the trial.

[23] Having considered the respective stands taken by both parties we are constrained to overrule this preliminary objection. A

[24] Section 51 CPC gives the appellant certain rights. These "rights", in our view, are the rights referred to under s. 3 CJA. The application by the appellant to have access to the various documents and materials is in fact an exercise of that right given to him by s. 51 CPC which says: B

> 51. Summons to produce document or other things.
>
> (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order. C D
>
> (2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same. E
>
> (3) Nothing in this section shall be deemed to affect the provisions of any law relating for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities. F

The order made by the High Court in allowing access to some of the documents and materials has, in effect, disposed of the rights of the appellant under s. 51 CPC. It is not an interlocutory order, nor one that was made in the course of a trial. It stands on its own. G

[25] Further, the application made by the appellant stands independently of the trial. It sought for a determination of the appellant's right pursuant to s. 51 CPC. Thus the order made by the learned judge on that application is a final order that has finally disposed of the rights of the appellant. It has disposed of the matter in dispute. It is therefore appealable. We therefore affirm this part of the judgment of the Court of Appeal dated 6 November 2009. H I

A

Core Issue

[26] We now turn to the second limb in the arguments which is the substance of this appeal. This turns on the question of whether the High Court was correct in supplying the various documents and
B materials sought for by the appellant.

[27] Although the originating motion filed by the appellant is premised on both s. 51 and s. 51A CPC, we find that, after analysing the reasons given by the learned judge, in essence the order made was based on s. 51 CPC, except for the two orders
C made pursuant to s. 51A(1)(b) and s. 51A(1)(c) CPC, which are not in issue in this appeal.

[28] In the context of this appeal, s. 51 CPC provides that when any court considers that the production of any document is
D necessary or desirable for the purposes of any trial, such court may issue a summons to the prosecution who is in possession of such documents.

[29] Section 51A CPC (A 1274/06) is new. It provides for a
E mandatory obligation on the part of the prosecution to supply to an accused person the first information report made under s. 107 CPC, a copy of any document which would be part of the prosecution's case and any statements of facts favourable to the defence, (with a safeguard on public interest consideration). That section is now
F reproduced in full. It says:

> 51A. Delivery of certain documents
>
> (1) The prosecution shall before the commencement of the trial deliver to the accused the following document:
>
> G
>
> (a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;
>
> (b) a copy of any document which would be tendered as part
> H of the evidence for the prosecution; and
>
> (c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.
>
> I (2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

[30] The High Court in allowing most of what the appellant asked for took into consideration both s. 51 and s. 51A together. The learned judge then addressed his mind on the philosophy underlying s. 51A which in his view had changed the prosecutorial process to be one more transparent and fair in accordance with the circumstances of the case. In summary, the learned judge in arriving at his decision, relied on the following basis, *viz*:

(i) To allow access to prosecution materials so that the appellant would know the case against him in advance to better prepare his defence.

(ii) To allow the appellant to prepare rebuttal evidence.

(iii) To enable the appellant to prepare cross-examination.

(iv) To avoid postponement.

[31] The learned judge relied on a High Court decision in *Retnasara Annarasa v. PP* [2008] 4 CLJ 90 where it was opined that s. 51 should not be read in isolation but in tandem with s. 51A CPC. It was also held in that case that with the new s. 51A in place, previous cases decided on the issue of disclosure of information and documents would no longer be applicable.

[32] The Court of Appeal hearing this instant appeal rejected this approach as disclosed in these passages:

> It is obvious from the judgment of the learned Judge in the instant case that he was in agreement with the decision of the High Court in *Retnasara* case. The learned Judge disregarded the decisions of the apex court on the interpretation of section 51 of the Code. In fact this was the main complaint by the Public Prosecutor.
>
> With due respect, we were unable to agree with the decision of the learned Judge. In our view the decision of the apex court in the *Raymond Chia*'s case and the *Husdi*'s case are relevant and applicable in respect of the application for documents not specifically mentioned in section 51A of the Code. In this connection we agree with the submission of the learned Solicitor General that the law on the application of section 51 had not changed notwithstanding the inclusion of the new section 51A of the Code.

[33] Was the learned judge correct in invoking the so-called philosophy underlying the new s. 51A into the interpretation of s. 51 CPC and in so doing to ignore the established principles laid down by the apex court in *Raymond Chia*?

[34] *Prima facie*, the meaning of any piece of legislation is to be given a literal meaning or grammatical meaning where the meaning is plain and clear. And this can be arrived at without consideration of other interpretative criteria. Parliament must be taken to mean what it says. The court in interpreting statutes must not be seen to be splitting hairs or producing any inconsistency or absurdity. (see Bennion on *Statutory Interpretation* 5th edn).

[35] Then there is the legal requirement that the object or purpose of a statute should be promoted in interpreting of any of its provisions as provided in s. 17A of the Interpretation Acts 1948 and 1967, which states:

> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[36] Thus, to import the so called philosophy behind s. 51A into s. 51, in interpreting the latter section in a liberal fashion as was done by the High Court, would be losing sight of the object of s. 51. It will be seen later in this judgment that the object of s. 51 is for a limited access. Its scope is restricted in law. In our view the High Court had erred in law in adopting the above approach. By so doing he had in effect expanded s. 51 CPC and had effectively changed the law. Changes in the law are for Parliament to decide, not the judiciary. Judges interpret the law. And judges, "under the guise of interpretation should not provide their own preferred amendments to statutes" (per Lord Diplock in *Duport Steels Ltd v. Sirs, HL* [1980] 1 All ER 541). Also, "a liberal interpretation dictated by sympathy is only permissible where the words or phrase in question may fairly be considered ambiguous." (per Ong CJ in *Navaradnam v. Suppiah Chettiar* [1973] 1 LNS 98 FC).

[37] In our view the learned judge was also wrong to say that earlier cases decided on s. 51 are no longer applicable. Having considered both sections, we agree with the Court of Appeal that s. 51 and s. 51A are two separate and distinct provisions. Section 51A is a provision which imposes an obligation upon the prosecution to supply certain documents and materials. It has no connection to s. 51 which gives the court a discretion to allow for discovery in specific instances. Hence, s. 51A should not be used in interpreting s. 51. Section 51 should thus be interpreted as it stands and taken to mean according to its plain and ordinary meaning and

not be differently read. Thus, s. 51 cannot now be modified with the aid of the so called philosophy underlying the new s. 51A, even if such a philosophy did exist. It is thus wrong for the learned judge to conclude that s. 51A, had changed the mode of prosecution in a criminal trial, and in the process ignoring past precedents on its interpretation.

[38] The learned Solicitor General II in concluding his submission on s. 51 CPC had stated that:

> The court would exercise its discretion under section 51 of the Code only if the court is of the view that it is necessary or desirable to have the document produced, having regards to sections 152 to 154 of the Code at the pre trial stage, whereas the court must subject the application to the relevancy test, having regards to the issues for adjudication in the course of the trial. (Emphasis added)

[39] In coming to that conclusion reference was made to the discussion on the Indian s. 91 Code of Criminal Procedure 1973 (equivalent to s. 51 CPC) in the case of *State Of Orissa v. Debendra Nath Padhi* [2004] 4 LRI 860, and the following passages were read to us:

> Any document or thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking s. 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. (Emphasis added)

The next passage reads:

> In so far as the accused is concerned, his entitlement to seek order under section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or the accused.

[40] Both counsel had also relied on the Supreme Court decision in *Raymond Chia*. In that case both accused persons were jointly charged with forgery under s. 467 and s. 471 of the Penal Code. The accused persons applied for various documents, including five documents mentioned in the charge in the possession of the prosecution, for their inspection. At the intermediate appeal in the High Court it was held that the application by the accused *Raymond Chia* was too general in terms and in the case of the accused Zainal too all-embracing to fall under s. 51. As such the learned President of the Sessions Court should not have exercised his discretion in granting the order to partially allow for the discovery.

[41] On further appeal to the Supreme Court, it was held that the court has a discretion to supply the documents asked for by an accused person. However, if the application is made before the commencement of the trial, the documents or materials to be supplied are confined to those only specified or referred to in the charge. A general demand should not be entertained. If the application is made in the course of a trial, the court needs to consider that the documents and materials asked for must be relevant to the issues for adjudication. The Supreme Court also held that the accused was not entitled to have access to things which were evidence that the prosecution proposed to prove the charge. One overriding principle expressed by the Supreme Court which we need to mention is that in exercising its discretion the Court would need to consider the justice of the case and at what stage of the proceedings the application for discovery was made. The principle of justice was made in reference to the duty imposed upon the prosecution to sufficiently particularize the charge having regard to s. 152, s. 153 and s. 154 CPC when the court is asked to exercise its discretion under s. 51 CPC at the pre trial stage. The Supreme Court said:

> The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied. The principle of justice was in fact emphasised by Hepworth J. in *Public Prosecutor v. Teoh Choon Teck* at page 35 when he said:

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

The qualification, however, is also stated by the learned Judge in the same page with which we respectfully agree:

> 'It will be observed that nowhere do sections 162, 163 and 164 say that the accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge'.

[42] Even when the discretion is to be exercised in favour of the application the Supreme Court cautioned against a carte blance exercise of the discretion to allow that access to discovery and production before the trial as if it were a pre-trial discovery in a civil case. In other words so long as the accused is given sufficient notice of the charge against him, the law is satisfied.

[43] Learned counsel for the appellant contended that in this case, the trial has begun upon the reading of the charge to the appellant although it has yet to commence in the sense that no witness has yet given evidence. He cited *SJN Thomas Manivello (supra)* and to this passage in support:

> A trial begins when the charge is read to the accused and his plea taken, but it only commences at the trial proper ie, when the prosecution calls its first witness.

Thus he said, the order made by the learned judge here was after the beginning of the trial. We are unable to agree with this contention. In our view, what is meant by the phrase "in the course of the trial" in *Raymond Chia* must mean that the trial proper has commenced or taken off in the sense that evidence has been led by the calling of witnesses. That phrase could not merely mean at the stage of only having the charge read to an accused person. The trial must have been in progress.

[44] In the context of the principles laid down in *Raymond Chia*, this stand taken by Mr. Karpal Singh with respect, is therefore wrong. In our considered view the application for discovery by the appellant was still one made at a pre-trial stage and not one made

A "in the course of the trial". At this stage, according to *Raymond Chia*, with which we agree, the appellant would only be entitled to those documents and materials pertaining to the charge, for him to understand the charge and prepare his defence.

B **[45]** Learned counsel for the appellant then urged us to depart from *Raymond Chia*. We find no justification to do so. We have looked at the authorities presented to us during arguments, including those from India and Singapore and found them united in their holding that s. 51 must necessarily operate within certain C inbuilt limitations. Although the language in that section is seemingly wide it should not literally be taken to be capable of allowing for a wide ranging application as was allowed by the High Court in this case. Its scope, according to all the authorities that we have read, is confined to the production of documents or D materials which are "necessary or desirable" for the purposes of the trial. And these two qualifications depend on which particular stage or point of time the application was made. If, as happened in this case, it was made at the pre-trial stage, then the discovery must, according to the principles we have alluded to earlier, be confined E to the matters that are specified in the charge. This is so because the justice of the case would have been met if the appellant had been fully notified of the charge he faces. He cannot then be said to be at any disadvantage to prepare his defence. At this stage, the documents and materials that the court may compel production are F confined to those that are necessary and desirable to the trial. And the charge in this case, in our view, is specific and is sufficiently particularized to accord the appellant a fair trial. Put another way, the requirement of justice as envisaged by the Supreme Court in Raymond Chia has, in this case, been met, sans the discovery of G those documents and materials.

[46] Now, the appellant contends that what he required was essential and relevant to the preparation of his defence. But at this stage, the defence is not yet a relevant consideration for the court H hearing this application. The appellant's application should not be turned into a mini trial to determine his defence on the charge. (see *State Of Orissa v. Debendra Nath Padhi*, *supra*).

[47] The appellant cannot say at this stage that his defence is going to be so and so and that he needs to have access to such I and such documents and materials to prepare for the defence. One settled principle attached to the application for discovery under s. 51 CPC is that, at this pre-trial stage, a roving and fishing inquiry for

evidence is not permissible. A catch all net cannot be cast. The appellant is not entitled to know by what means the prosecution proposes to prove the facts underlying the charge he faces. This remains the prerogative of the prosecution. Mohd Azmi J, at the intermediate appeal in *PP v. Raymond Chia Kim Chwee & Another Case* [1983] 1 CLJ 321; [1983] CLJ (Rep) 798, described this situation neatly in this manner:

> The important thing is to keep a proper balance between the right of the accused to know exactly what the charge is against him so as to give him reasonable opportunity to prepare his defence, and the right of the prosecution not to disclose their evidence and the manner in which they are to prove their case before trial in order to sustain our adversary system of criminal justice. To what extent the right of the prosecution not to disclose documents specifically referred to in the charge before trial is qualified by the right of the accused to be given reasonable opportunity to prepare his defence is of crucial importance in the administration of criminal justice.

[48] In our view, the appellant has thus not met the dual requirements of necessity and desirability laid down in s. 51 CPC. We concur with the finding of the Court of Appeal on this issue.

[49] We are conscious that the orders made by the learned trial judge were in the exercise of his discretion. The phrase "may issue a summons" clearly expresses this discretion given to the court. Mr Karpal Singh referred us to the case of *Vasudevan Vazhapulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101 FC in support of the principle that an appellate court should not disturb any decision made in the proper exercise of a judge's discretion. We agree that this is a settled principle. Only that there are qualifications. Some of which are that any exercise of discretion based on an error of law or a wrong principle or irrelevant consideration or which resulted in a miscarriage of justice may be reversed by an appellate court (see Federal Court case of *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493). In our considered view this is exactly what has happened in this case. The learned judge here had passed over settled principles and took into consideration irrelevant matters as the basis of his decision. He had thus improperly exercised that discretion. The Court of Appeal was not wrong to hold that the discretion had not been judicially exercised by the learned judge. We thus affirm the Court of Appeal's findings.

[50] At the close of arguments, learned assisting counsel for the appellant, Dato Param Cumaraswamy, called our attention to a document called the "General Comment No. 32 of the UN Human Rights Committee, 19th Session". We were reminded of the rights to equality before the courts and to a person's right to a fair trial. One feature found in that document is the provision on "adequate facilities" to be given to an accused person. This includes access to documents and other evidence, including materials that the prosecution "*plans to offer in court against the accused*" (see para 33). (emphasis added).

[51] The right to a fair trial is of course a universal principle. It is inviolable. It has since been fully developed in the common law practice including here, in Malaysia. This was emphasized very recently in our High Court through the words of Mohd Zawawi JC in *PP v. Mohd Fazil Awaluddin* [2009] 2 CLJ 862, which we wholly approve. The learned JC said this:

> The principle of a fair trial is sacrosanct in all civilized legal jurisdictions. It is a principle of universal application. In Malaysia the principle of fair trial and fairness has been long-established and recognized in several decisions. Some of these include *Cheah Yoke Thong v. Public Prosecutor* [1984] 1 MLJ 311 and *Azahan bin Mohd Aminallah v. Public Prosecutor* [2005] 5 MLJ 334; [2004] 6 AMR 810.

However, it must be stressed that there are fundamental safeguards built into the law to guarantee equality and fairness in a trial. For this appeal, we have mentioned this earlier in our discussion on discovery under s. 51 CPC. It needs also be stated that these safeguards are to be examined against the primary consideration that the prosecution's duty is to prosecute not to defend. (see Lord Goddard CJ's remarks in *Rex v. Bryant And Dickson* [1946] 3 Cr App R 146).

[52] Now, the words "plans to offer in court against the accused" which we underscored above have, we think, been put in place when Parliament added s. 51A to the CPC. We need to repeat here s. 51A(1)(b) which says:

> (1) The prosecution shall before the commencement of the trial deliver to the accused:
>
> (b) A copy of any document which would be tendered as part of the evidence of the prosecution;

In our view, this new provision strengthens the guarantee of a fair trial in providing the adequate facilities as purported in the General Remarks document of the Human Rights Committee that was read to us. Section 51A CPC has, in our opinion, made the battlefield move level, to preserve the "equality of arms principle", ensure the fairness of a trial and ultimately uphold the very integrity of the courts in its administration of criminal justice. This should also be considered in the light of our criminal justice system where the burden of proof lies throughout on the prosecution, which, together with the common law principle of presumption of innocence, safeguard that fairness.

[53] For these reasons, we dismiss this appeal and uphold all the findings of the Court of Appeal.